No. 8942 2

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH BERNARD SPRECKELS, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	}

PETITIONER'S OPENING BRIEF.

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Subject Index

Page

Opinion Below 1

Statement of Pleadings and Facts Showing Jurisdiction.... 1

Abstract of Case 2

Specification of Error 4

Summary of Argument

1. Statute requires taxation of accumulations to trustees 4
2. Logic of statutory distinction.................... 5

Argument

I. The Facts. (Assignment of Error (1) a and b.).... 6

1. Accumulations were paid over after petitioner attained his majority 7
2. Terms of the trust.................................... 7

II. Income accumulated during petitioner's minority under provisions of trust was taxable to the trustees and not to petitioner on attaining majority, although it accrued during year paid. (Assignments of error (2), (3) and (4).).................................... 10

1. Provisions of Revenue Act of 1932.............. 11
2. The income of the trust accumulated during petitioner's minority was accumulated for the benefit of unascertained persons and was taxable to the trustees 12
3. The accumulations, although paid to petitioner in the taxable year, were not paid to him "currently" within the meaning of section 162 (b).... 14
4. Income accumulated for years of trust prior to termination, concededly taxable to fiduciary..... 16
5. The same rule is applicable to income accumulated during last year of trust.................................... 17
6. Accumulated income when received by petitioner was part of corpus of bequest.................... 19
7. Board declines to follow the decision of the Third Circuit in the case of Roebling v. Commissioner.. 21

Conclusion 26

Table of Citations

Statutes

Revenue Act of 1924: Pages
Sec. 219 (b) (2) 22
Revenue Act of 1926:
Sec. 213 (b) (3) 18
Sec. 219 (a) (1) 19
Sec. 219 (b) (2) 19
Secs. 1001, 1002 and 1003 2
Revenue Act of 1928:
Sec. 161 24
Sec. 162 24
Revenue Act of 1932:
Sec. 22 (b) (3) 5, 18, 26
Sec. 161 (a) (1) 4, 11, 19, 24
Sec. 161 (a) (2) 11, 15
Sec. 161 (b) 11, 14, 15, 26
Sec. 162 (b) 4, 14, 19, 22, 23
Sec. 162 (c) 18
Sec. 1101 (a) 2
Revenue Act of 1934:
Sec. 519 (a) 2
Revenue Act of 1936:
Sec. 272 (a) 2

Court Decisions

Blake's Estate, 157 Cal. 448, 108 Pac. 287 13

Codman v. Miles, 28 Fed. (2d) 823 23
Commissioner v. Stearns, 65 Fed. (2d) 371 .... 23, 24
Commissioner v. Simmon (Mass. 1935), 198 N. E. 741, 102 A. L. R. 273 .... 12, 20

Helvering v. Butterworth, 290 U. S. 365, 78 L. ed. 365 21

Irwin v. Gavit, 268 U. S. 161, 69 L. ed. 897 23
Roebling v. Commissioner, 78 Fed. (2d) 444 .... 18, 25

Page
Steele's Estate, 124 Cal. 533, 541, 57 Pac. 564, 567........ 20

Van Antwerp v. United States, 92 Fed. (2d) 871, 876..... 23

Board of Tax Appeals

Appeal of Philip D. C. Ball, 27 B. T. A. 388, 401.......... 17
Appeal of Jacob F. Brown, Trustee, 9 B. T. A. 521....... 17
Appeal of Mason L. Dean, 35 B. T. A. 839, 844........... 17
Appeal of Augustus H. Eustis, 30 B. T. A. 820............ 16
Appeal of Robert C. Roebling, 28 B. T. A. 644............ 18
Appeal of Margaret B. Sparrow, et al. Trustees, 18 B. T. A. 1.. 17

Miscellaneous

Bogert, Trusts & Trustees, Sec. 217 (c), Vol. 1, p. 665..... 20

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OPINION BELOW.

This is a petition for the review of a decision of the Board of Tax Appeals entered pursuant to findings of fact and an opinion of the Board reported in 37 B. T. A. No. 104. (R. 18-30.)

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The petitioner is an individual resident in San Francisco, California. (R. 19.) He filed his income tax return for the year 1932 with the Collector at San Francisco. (R. 24.) On May 12, 1936, the respondent sent petitioner a ninety day letter proposing to assess additional income taxes for that year. (R. 9-16.) On

July 6, 1936, and within the time allowed by law petitioner appealed from said proposed assessment to the Board of Tax Appeals. (R. 1, 16.) After a hearing the Board filed its findings of fact and opinion and on April 16, 1938, a decision was entered determining a deficiency in petitioner's income tax for the calendar year 1932 in the sum of $3886.11. (R. 31.) On July 6, 1938, petitioner filed with the Board his petition for review of the decision by this Court. (R. 2, 36.)

The Board had jurisdiction of the appeal under section 272(a) of the Revenue Act of 1936. (c. 690, 49 Stat. 1721.) This Court has jurisdiction of the petition for review under sections 1001, 1002 and 1003 of the Revenue Act of 1926 (c. 27, 44 Stat. 109-110), as amended by section 1101(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 286), and section 519(a) of the Revenue Act of 1934. (c. 277, 48 Stat. 760.)

ABSTRACT OF CASE.

The appeal was heard on an "Agreed Statement of Facts" and the admissions in the pleadings. The statement of evidence contains so much of the agreed statement as is relevant to a consideration of the assignments of error. These facts will be briefly summarized.

Petitioner is the son of Adolph B. Spreckels, who died testate in the year 1924. By the last will and testament of said Adolph B. Spreckels, deceased, the residue of his estate was bequeathed and devised to certain trustees upon trust, during the minority of

petitioner, to accumulate a portion of the net income of the trust estate and upon petitioner attaining the age of majority to pay to petitioner such accumulated net income and thereafter to pay him his proper share of the current net income. In the event petitioner should not reach the age of legal majority, the trust provided for other disposition of said accumulated income and of the current net income thereafter accruing. Petitioner attained the age of legal majority on October 30, 1932, at which time said trustees had in their hands certain moneys representing income accumulated by them under said trust during the portion of the calendar year 1932 up to that date, and which, according to the terms of said trust, were thereafter paid to petitioner. Petitioner in filing his income tax return for the calendar year 1932 did not include said accumulations as income for said year.

Petitioner contends that the income of the trust accumulated during his minority was income taxable to the trustees, and that when, on attaining his majority, a portion of the accumulated income was paid to him, it had lost its character as income and came to him as a bequest under his father's will and could not be regarded as income taxable to him. The Board, however, by its decision here under review, has affirmed the action of respondent in transferring these accumulations from the trustees to the petitioner for the purpose of determining his income tax liability.

SPECIFICATION OF ERROR.

Petitioner on this review relies upon four assignments of error. Assignment (1) (R. 34) relates to certain uncertainties in the findings of fact, while assignments (2), (3) and (4) (R. 34-35) point to the errors of law involved in the Board's decision, which it is sought to have reviewed by this Court.

SUMMARY OF ARGUMENT.

1. Statute requires taxation of accumulations to trustees.

The question of whether the income accumulated by the trustees is taxable to petitioner or to the trustees is governed by the provisions of sections 161 and 162 of the Revenue Act of 1932. So far as we are here concerned, the sections place the income of property held in trust in two categories:

(1) income accumulated in trust for the benefit of unascertained persons or persons with contingent interests and income accumulated or held for future distribution under the terms of the trust;

(2) income which is to be distributed currently by the fiduciary to the beneficiaries.

The income falling within category (1) is taxable to the trustee, and that falling within category (2) is taxable to the beneficiary.

The income of the Spreckels' trust collected between January 1 and October 29, 1932, was income

falling within category (1) and therefore taxable to the trustees and not to petitioner.

The syllogism demonstrates the correctness of petitioner's position, concludes the issue, and requires a reversal.

2. Logic of statutory distinction.

Not only do the provisions of the Revenue Act require the taxation to the trustee of income being accumulated, but in so doing the statute recognizes the well established concept that such accumulations, while undoubtedly income in the hands of the trustee, are by force of the direction to accumulate, converted into principal or corpus so far as the beneficiary is concerned. This legal concept fits exactly into the statutory scheme. Any other treatment of accumulated income would do violence to that concept and would be of doubtful validity, i. e., an attempt to tax to one the income of another.

The treatment of accumulations as taxable to the trustee also fits in with another phase of the scheme of income taxation. The accumulations, as has been seen, are to the beneficiary corpus of the trust, and their freedom from income tax when received by him becomes a corollary of the rule, found in section 22(b)(3) of the same Revenue Act, that gifts and bequests are exempt from taxation.

Furthermore, the distinction and logic of taxing to the trustee income directed to be accumulated, is unquestioned by the Bureau of Internal Revenue and

the Board of Tax Appeals as to any year other than the year in which the accumulations are distributable.

The following argument will demonstrate that there is no authority for the claim to a different incidence of the tax in one year of the period of accumulation than in the others.

ARGUMENT.

I. THE FACTS.

ASSIGNMENT OF ERROR (1) a AND b. (R. 34.)

(1) The Board of Tax Appeals erred in making the following findings of fact in that said findings are not supported by any evidence:

a. Any finding that the income accumulated by the trustees under the trust created by the last will and testament of Adolph B. Spreckels, deceased, during petitioner's minority, was paid to him at any time prior to his attaining his majority.

b. The finding that the trust created by the last will and testament of Adolph B. Spreckels, deceased, does not provide that the accumulated net income of the trust should be added to and become a part of the principal of said trust upon distribution.

As heretofore stated, the appeal was submitted to the Board on an agreed statement of facts and the admissions in the pleadings. There can be of course no dispute as to the facts under such circumstances.

The findings of fact and opinion of the Board, however, suggest some uncertainty as to the time the accumulations were paid to petitioner (R. 23), and the exact terms of the trust. For those reasons the two assignments of insufficiency of the evidence to support the findings were made.

1. Accumulations were paid over after petitioner attained his majority.

The stipulated facts are that the accumulations to October 29, 1932, were $8042.65 and that they were paid to petitioner on October 30, 1932, the day he attained majority. (R. 45.)

2. Terms of the trust.

The legal effect of the language used in creating and defining the trust is of course a conclusion for the Court to draw from that language and here likewise the record, as preserved in the statement of evidence, presents the provisions of the trust in *haec verba.*

The Board in its opinion says:

> "In this proceeding the amount in question, distributed to the petitioner, was income of the trust and it was distributed to petitioner as income." (R. 29.)

Again the Board says:

> "We find no terms in the trust involved here which change the character of what was income of the trust to something else when distributed to our petitioner. He received no principal from the trust in the taxable year." (R. 30.)

The will of petitioner's father which created the trust was admitted to probate in the Superior Court in San Francisco and, after due proceedings, a decree of distribution was entered under which the residue was distributed to the trustees. All of the decree in any way relating to the trust is quoted in the statement of evidence. (R. 38-45.) Briefly, it provided that one-half of the income of the trust was to be paid to the testator's widow during her lifetime, the balance of the income, until the youngest child attained majority, was to be accumulated for or paid to the three children of the decedent. As the widow and all three children were living throughout the entire year 1932, the provisions of the trust dealing with the contingencies which would have arisen had the widow died require no reference here. The clause of the decree providing for the distribution of the income among the three children closed with a proviso reading as follows:

> "* * * provided, however, that during the minority of any of said children their respective shares of said net income shall be accumulated and disposed of by said trustees, as follows:
>
> "As each child attains the age of majority, he or she shall receive from the trustees his or her proper share of the accumulated net income, and also shall thereafter receive his or her proper share of the current net income, which shares shall be determined by a fraction whose numerator shall be the number one (1) and whose denominator shall express the number of said children then living; including the issue of any deceased child as one person, in representation of

> his or her parent; and such issue shall take the share his or her parent would have taken if living, by right of representation." (R. 40-41.)

The decree of distribution also provides:

> "If, at the time of any division or distribution of any part of said trust estate, any of said children, viz., Alma Spreckels Rosekrans, Adolph Bernard Spreckels, and Dorothy Constance Spreckels, shall have died leaving issue surviving, then such issue shall take the share which his or her parent would have taken, if living, by right of representation, notwithstanding anything hereinbefore contained." (R. 42.)

The decree further provides that if none of the children of the decedent, nor the issue of any of them, should be living upon the termination of the trust, then the trust property should go to and vest in certain heirs of John D. Spreckels, the deceased brother of the testator. (R. 43-44.)

In view of the terms of the trust as given above, it is petitioner's contention that the legal effect of the direction to accumulate was to convert the accumulations, so far as the beneficiaries were concerned, into principal and that the accumulations in this case were principal when distributed and therefore free from taxation as income in petitioner's hands. There is nothing in the language of the trust provisions to require or warrant any other interpretation. This point will be elaborated later in the argument.

II. INCOME ACCUMULATED DURING PETITIONER'S MINORITY UNDER PROVISIONS OF TRUST WAS TAXABLE TO THE TRUSTEES AND NOT TO PETITIONER ON ATTAINING MAJORITY, ALTHOUGH IT ACCRUED DURING YEAR PAID.

ASSIGNMENTS OF ERROR (2), (3) AND (4). (R. 34-35.)

(2) The Board of Tax Appeals erred in determining that the accumulations received by petitioner from the trustees of the trust created by the last will and testament of Adolph B. Spreckels, deceased, upon petitioner attaining the age of legal majority on October 30, 1932, were income currently distributed by said trustees to petitioner within the meaning of the Revenue Act of 1932.

(3) The Board of Tax Appeals erred in determining that the accumulations paid by the trustees under the trust created by the last will and testament of Adolph B. Spreckels, deceased, to petitioner on his attaining the age of legal majority on October 30, 1932, represented income subject to taxation to petitioner in the calendar year 1932 under the provisions of the Revenue Act of 1932.

(4) That the Board of Tax Appeals erred in determining that there was a deficiency of income tax due from petitioner for the year 1932 under the provisions of the Revenue Act of 1932, by reason of the receipt by petitioner of moneys representing income accumulated by the trustees of the trust created by the last will and testament of Adolph B. Spreckels, deceased, prior to petitioner attaining the age of majority.

These three assignments of error raise essentially the same legal question, viz.: That the accumulations

under the terms of the trust during the calendar year 1932 prior to petitioner's majority, were not income taxable to him under the applicable act.

1. Provisions of Revenue Act of 1932.

The question as to the taxability to petitioner of the accumulated income is governed by Supplement E of the Revenue Act of 1932. (c. 209, 47 Stat. 219.) Section 161 of this Act, so far as is applicable to this review, provides:

> "(a) Application of Tax.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including:
>
> "(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;
>
> "(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; * * *
>
> "(b) Computation and payment.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor)."

2. The income of the trust accumulated during petitioner's minority was accumulated for the benefit of unascertained persons and was taxable to the trustees.

The income in question was, under the stipulated facts, within the classification of income described in subsection (a) (1), *supra.* Until the date petitioner attained majority it could not be ascertained who would take the accumulations, for, had he died prior to that date, they would have passed under the express provisions of the decree of distribution to others, viz.: his heirs, or his sisters, or their heirs, or the descendants of his father's brother, but not to petitioner nor to his estate.

In other words, until the date of his majority, petitioner's interest in the accumulations was contingent. The situation is well described by the Supreme Court of Massachusetts in the late case of *Commissioner v. Simmon* (Mass. 1935), 198 N. E. 741, 102 A. L. R. 273, where the Court says (198 N. E. 742, 102 A. L. R. 274):

> "Whatever may be the precise nature of the interest of David A. Simmon in the trust funds and their accumulations in other connections (see Minot v. Tappan, 127 Mass. 333; Clarke v. Fay, 205 Mass. 228, 91 N. E. 328, 27 L. R. A. [N. S.] 454), it is plain that he had no right to enjoyment in possession of any part of the funds, as to either principal or accumulations, until he reached the age of twenty-one years. The allowances for his support and education rested in the discretion of the trustees. However his interest may be described, it was subject to be utterly divested if he should die before reaching that age. The

income was not paid to him year by year and it was not paid to him as income. It was converted into capital in New York as received year by year by the New York trustees, acting pursuant to the will. Tax Commissioner v. Putnam, 227 Mass. 522, 526, 116 N. E. 904, L. R. A. 1917F, 806; Maguire v. Tax Commissioner, 230 Mass. 503, 512, 120 N. E. 162; Springdale Finishing Co. v. Commonwealth, 242 Mass. 37, 41, 136 N. E. 250. That which the trustees transferred to David A. Simmon in 1930 was paid to him as a legacy. It was a unit, not due until that specified time and payable for his benefit only upon the condition that he was then alive. Mitton v. Treasurer and Receiver General, 229 Mass. 140, 118 N. E. 274; Boston Safe Deposit & Trust Co. v. Commissioner of Corporations and Taxation, 273 Mass. 208, 174 N. E. 114."

The quoted opinion but states the general rule. While the California courts have not had before them a case dealing with income accumulated under a provision similar to the one here involved, that they would follow the general rule is apparent from the decision of the California Supreme Court in *Blake's Estate,* 157 Cal. 448, 466, 108 Pac. 287, 294, where, in discussing the character of the interest of a beneficiary in the corpus of a trust which was to be paid to her when she reached the age of thirty, the court characterizes the attainment of that age as a condition precedent to the vesting of the corpus and says, as to a beneficiary who did not reach that age, that she did not acquire any vested interest in the trust property.

It follows unescapably from the provision of subsection (b) of section 161, *supra,* that the tax on these accumulations was to be paid by the fiduciary, i. e., the trustees of the Spreckels' trust.

3. The accumulations, although paid to petitioner in the taxable year, were not paid to him "currently" within the meaning of Section 162(b).

To escape the unescapable conclusion just reached, that the accumulations were taxable to the trustees, the respondent contended before the Board that the liability for the tax, so clearly placed on the fiduciary by section 161(b), is shifted to the beneficiary by the provisions of subsection (b) of the following section 162, which read:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

Any argument that the provision just quoted changes the incidence of the tax is superficial, however. It will be noted that the income which is to be deducted in computing the income of the trust and included in computing the income of the beneficiary, is described as "income * * * which is to be distributed currently by the fiduciary to the bene-

ficiaries", or the identical sort of income described in subsection (2) of section 161(a), above quoted, which there clearly appears to be income of a category other than that accumulated for unascertained persons, etc. The argument does such violence to the ordinary rules of statutory construction that it can be adopted and applied only in the event most cogent reasons so require. This argument will establish that not only is there no reason for such a forced and different construction of definitions so closely placed in the statute, but that the respondent's construction will make an otherwise logical plan of taxation, not only illogical, but arbitrary and offensive to any equitable concept of the incidence of income taxation.

It should be noted that even assuming subdivision (b) of section 162 applicable to the accumulations, it cannot be said, so far as petitioner is concerned, that the income they represent was paid to him "currently". The word "currently" is defined in Webster's International Dictionary as "in a current manner"; while the word "current", in the only sense in which it could be applicable to the present discussion, is defined as "now passing, as time, or belonging to the present time". It is obvious that as the word is used in the section under consideration, it refers to income that is distributed as it is received or earned and "currently" must mean "currently with the period covered by the trust", and where, as here, the period of the trust has terminated as to the accumulated income, it cannot be said that a payment made after the end of the period is paid "currently"

during that period. The *currency* of the income terminates with the termination of the trust for its accumulation and the subsequent payment in no way represents a current payment.

4. Income accumulated for years of trust prior to termination, concededly taxable to fiduciary.

So far as the income accumulated pursuant to the direction of a will or trust instrument during any year but the year in which the period of accumulation terminates and the accumulations are paid to the beneficiary, the accumulation is taxable to the fiduciary by the express provisions of the Revenue Act above quoted, and the Board has so held in every case. In the *Appeal of Augustus H. Eustis,* 30 B. T. A. 820, under the terms of a will creating a trust, the income was to be paid semi-annually on June 15th and December 15th to the beneficiaries living on such dates and could not be assigned or anticipated, the will providing that in the event of the death of a beneficiary between such dates the share that he would have received, had he remained alive, should go to the other beneficiaries. The question arose as to whether income for the period December 15 to December 31, 1930, constituted income taxable to the trustees as income accumulated in trust for the benefit of unascertained persons or persons with contingent interests within the meaning of the statute, and the Board said (p. 824):

> "The petitioner's right to receive the income in controversy being dependent upon his being alive on some date in the future, and the continu-

ance of life until any particular date in the future being one of the most uncertain things known to human experience, we think the petitioner's interest in the income was highly contingent and at most constituted only a possibility."

The Board held that the income was not taxable to the beneficiary and dismissed as inapplicable the respondent's contention that, since the income was to be distributed semi-annually, it was income to be distributed currently within the provisions of section 162(b) and taxable to the beneficiary in any event.

To the same effect see:

Appeal of Philip D. C. Ball, 27 B. T. A. 388, 401-402;

Appeal of Mason L. Dean, 35 B. T. A. 839, 844.

5. The same rule is applicable to income accumulated during last year of trust.

However, the Board has taken a different and inconsistent attitude as to income accumulated during the fractional year in which the period of accumulation terminates and has held that such income is to be treated as currently distributed and taxable to the beneficiary. The earlier appeals of *Jacob F. Brown, Trustee,* 9 B. T. A. 521, and *Margaret B. Sparrow, et al. Trustees,* 18 B. T. A. 1, involved the application of provisions of the Revenue Acts of 1916 and 1918, the language of which differs materially from that of the sections of the Act of 1932 here involved and which may have required such a deci-

sion. From the citations in these two appeals it is evident that the Board regarded the payments of accumulated income as falling in the category of income distributed at the option of a trustee which under the 1932 Act is covered by section 162(c). On the authority of the earlier appeals, the Board, in the *Appeal of Robert C. Roebling*, 28 B. T. A. 644, applied to the same effect the provisions of the 1926 Act which are practically identical with the quoted sections of the 1932 Act. However, the *Roebling* case was taken to the Circuit Court of Appeals for the Third Circuit which reversed the decision of the Board.

Roebling v. Commissioner, 78 Fed. (2d) 444.

The Circuit Court of Appeals placed its decision squarely on the proposition that the accumulations when received by the beneficiary were not income but corpus. After referring to section 213(b)(3) of the Revenue Act of 1926, providing that gross income does not include "the value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income) * * *", the same language being found in section 22(b)(3) of the Revenue Act of 1932, the Court says (p. 447):

> "The Commissioner says that this was income in 1925 to the petitioner, since his interest in the trust was vested and the sum was delivered to him in the year that it was received by the trust.
>
> "But, of course, that is not so. The sum was income to the trust but its character was totally

different when it was received by the petitioner. This sum came to him under the terms of the will when he became twenty-one years of age as part of the principal of the trust fund. The sum was taxable to the trustees by the express provisions of section 219(a)(1) of the Revenue Act of 1926 (26 U. S. C. A. Sec. 960 note). It was no more income to him than accumulations made in years prior to 1925.

"Nor is section 219(b)(2) (26 U. S. C. A. Sec. 960 note) apposite. The accumulated income for 1925 was not income of a trust 'which is to be distributed currently by the fiduciary to the beneficiaries'.

"The Commissioner and Board erred in holding that the accumulated income of $37,374.20 was taxable to the petitioner and not to the trustees."

As has been pointed out, sections 219(a)(1) and 219(b)(2) referred to in the opinion are to all intents identical with sections 161(a)(1) and 162(b) of the 1932 Act.

6. Accumulated income when received by petitioner was part of corpus of bequest.

The reasoning of the Circuit Court of Appeals in the *Roebling* case, that the accumulations were not taxable to the beneficiary, since when received by him their character had changed to principal and they came to him as a bequest, is but a corollary of the conclusion already reached that the beneficiary's interest was not vested until after the termination of

the period of accumulation. In other words, the direction to accumulate and pay the accumulations on the occurrence of a future contingency, had the effect of changing their nature from income to corpus, so that upon the happening of the contingency they represented a different sort of a gift which depended for its donation not upon the volition of the trustee but upon the directions contained in the decree of distribution itself where such accumulations were specifically disposed of.

An accumulation cannot be defined without describing it as an accretion to principal.

Bogert, Trusts & Trustees, Sec. 217(c), Vol. I, page 665:

> "An accumulation is an addition of income to the capital of the trust so that when it is disbursed, it will be paid out as a part of the corpus and not as current revenue."

In re *Steele's Estate,* 124 Cal. 533, 541, 57 Pac. 564, 567:

> "Where the rents, dividends, or other income is treated by the trustee as capital, and he invests it, makes a new capital of the income derived therefrom, and invests that, and so on, such capital and accrued income constitutes 'accumulations'."

The Supreme Court of Massachusetts in the case of *Commissioner v. Simmon, supra,* speaking of income accumulated for a beneficiary during his minority says (198 N. E. 742, 102 A. L. R. 275):

"So far as concerned the interest of David A. Simmon in the income of the funds received year by year by the trustees, it became forthwith an accretion to capital and not income to him. It might never be paid to him or for his benefit. Whether he or his estate would ever receive it depended upon the contingency that he should reach the age of twenty-one years. He had no power of actual disposition of it until paid to him. When this fund was paid to David A. Simmon it was a payment of capital and not of income."

It must follow from this concept of accumulated income that it is not income paid over to the beneficiary when he receives it. If the amount paid over is not income it is of course immaterial whether it should be regarded as having been distributed currently by the fiduciary.

7. Board declines to follow the decision of the Third Circuit in the case of Roebling v. Commissioner.

The present appeal is the first opportunity the Board has had to consider the question here involved since its reversal in the *Roebling* case. The Board, however, declined to follow the conclusions reached by the Circuit Court of Appeals. It first attempts to base its contrary decision on the authority of the opinion of the Supreme Court in *Helvering v. Butterworth,* 290 U. S. 365, 78 L. ed. 365. It is not asserted that the facts before the Supreme Court in any way resemble those of the present case, but only that the similar sections of the Revenue Act of 1924 were

involved. Four separate causes were disposed of by the Supreme Court's opinion.

Each of the four appeals was concerned with right of testamentary trustees to deduct under section 219(b)(2) of the 1924 Act (identical with section 162(b) of the 1932 Act, above quoted), the portion of the income of a trust paid to the widow of the testator. In three of the causes, the portion of the income was paid to the widow under a provision of the will accepted by her in lieu of her statutory rights in the estate and was less in the aggregate than the value of such rights. The Circuit Courts of Appeals were affirmed in their rulings that the portions of the income so paid were deductible by the trustees. In the fourth cause, it was held, reversing the Circuit Court of Appeals, that the trustees could not deduct an annuity which by the terms of the trust was payable to the testator's widow irrespective of the insufficiency of the income of the trust. Clearly these cases furnish no authority for the Board's disposition of the present case. In every one of them the beneficiaries had vested interests and were currently receiving the income of the trusts.

It is possible the *Butterworth* case is cited by the Board only to the proposition that it was the general purpose of the statute "to tax in some way the whole income of all trust estates". (Vide opinion, R. 28.) The point requires no consideration here since the question is only whether the trustees or the beneficiary should pay the tax. The trustees for the trusts created by petitioner's father, filed a return and in-

cluded the accumulated income therein, and that return and the fiduciaries' taxable income were under consideration at the time respondent adjusted petitioner's income to include the accumulations. (Vide 90 day letter, R. 12.) By including the accumulations in petitioner's taxable income the Bureau could collect a much larger tax than if they were taxed to the trustees. Certainly that circumstance presents no argument for an affirmance.

Van Antwerp v. United States (C. C. A. 9th Ct.), 92 Fed. (2d) 871, 876.

The Board also cites, apparently in support of its conclusion, the cases of *Irwin v. Gavit,* 268 U. S. 161, 69 L. ed. 897; *Codman v. Miles,* 28 Fed. (2d) 823, and *Commissioner v. Stearns,* 65 Fed. (2d) 371, although none of them involves a situation at all similar to the one here presented, nor are they particularly helpful to the conclusion reached by the Board.

The case of *Irwin v. Gavit,* arose under the first income tax statute passed under the authority of the Sixteenth Amendment, the Court holding that income from a trust currently paid to a beneficiary was taxable to the beneficiary under that Act. The case of *Codman v. Miles,* holds to the same effect under the revenue acts applicable to the years 1918 to 1922, inclusive. The conclusion reached in these cases is embodied in section 162(b) of the 1932 Revenue Act taxing to the beneficiary income of a trust currently payable to him. Neither case involved the taxability to a beneficiary of income of the other category de-

scribed in section 161(a)(1) of the 1932 Act, viz.: income accumulated for unascertained persons, etc.

The case of *Commissioner v. Stearns* arose under the 1928 Act, which contained sections 161 and 162 in identical language with the same sections of the 1932 Act. The Court was there concerned with income of the third category defined in section 161 (a), viz.: income received during administration and the right of the fiduciary to a deduction from such income of so much thereof as was properly paid or credited during the year to any legatee, heir or beneficiary under subdivision (c) of section 162. In so far as the opinion is helpful, it would seem to support petitioner's contentions, for the Court says: (page 373):

> "Subdivision (b) of that section [162] allows to the fiduciary the deduction of the second class [of section 161]; subdivision (c) the deduction of so much of the third and fourth classes as 'is properly paid or credited during such year to any legatee, heir, or beneficiary'. *No deduction is of course allowed of the first class.*" (Italics supplied.)

If no deduction was allowable of the first class, viz.: income accumulated for unascertained persons, etc. such income was not taxable again to the beneficiary by any conceivable construction of section 162 (b).

Some attempt is made in the Board's opinion (R. 29-30) to distinguish the *Roebling* case on the facts, with the assertion that the accumulations in the present case were "distributed to petitioner as income" As heretofore explained, it was because of this attempt

that it was necessary to include the language of the trust provisions in the statement of evidence. True, the language is "as each child attains the age of majority, he or she shall receive from the Trustees his or her proper share of the accumulated net income".

This language is substantially identical with that of the will in the *Roebling* case, viz.: "to pay, transfer, deliver and convey to him or her the principal of such equal share, *together with any accumulated income thereon.*" (78 Fed. (2d) 447.) (Italics supplied.) This is not the equivalent of a declaration that the income shall be received by such child *qua* income (even assuming the testator's declaration could have such effect in view of the proposition already discussed that a direction to accumulate converts the income to corpus), but is only an expression identifying the accumulations. Furthermore, if the expression necessitates the treatment of the accumulations when distributed as taxable income, it would apply as well to income accumulated in prior years, which has never been, and cannot well be so treated. (Ante p. 16.)

Five members of the Board expressed their dissent to the decision in the present case, in the following brief opinion written by Member Sternhagen:

> "The amount of the trust income which the petitioner received in 1932 was, in my opinion, not what the statute described as income 'which is to be distributed currently by the fiduciary to the beneficiaries'. The distribution was entirely because the beneficiary had reached his majority,

> and I do not think the word "currently" can be appropriately applied to it. The conclusion of Roebling v. Commissioner, 78 Fed. (2d) 444, seems to me to be correct." (R. 30.)

CONCLUSION.

It is submitted that the conclusion is unescapable that the statute provides for the taxation to the fiduciary of income accumulated for unascertained persons and persons with contingent interests, throughout the entire period of the accumulations.

Such treatment is a recognition of the well established rule that a direction to accumulate converts income received by the fiduciary into corpus when it is paid to the beneficiary entitled thereto on the termination of the period prescribed for the accumulation.

Hence, both by the provisions of section 161 (b), directing the taxation of such income to the fiduciary and section 22 (b) (3) excluding from taxation a gift, bequest, or devise, the beneficiary cannot be subjected to an income tax on his receipt of the accumulations.

Such accumulations when paid over to the beneficiary are not income "currently" paid to him, first, because they are not "income", but "principal", and secondly, because the statute regards such accumulations as falling in a category expressly differentiated from "current income".

Any attempt by Congress to tax accumulations to a person other than the fiduciary would immediately

raise a constitutional question, since it is impossible to conceive of a more arbitrary act within the inhibition of the Fifth Amendment than the imposition of an income tax on one person for income received by another. Fortunately, the statute is clear, the burden is placed on the fiduciary and no construction should be tolerated which would place it elsewhere.

This Court should follow the reasoning of the Circuit Court of Appeals for the Third Circuit, in the *Roebling* case and reverse the Board.

Dated, San Francisco,
September 19, 1938.

Respectfully submitted,
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